



Copyright Review Board
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

August 17, 2022

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**Re: Second Request for Reconsideration for Refusal to Register Fruit Bunch
(SR # 1-9895700671; Correspondence ID: 1-4SI85UP)**

Dear Mr. Mitchell:

The Review Board of the United States Copyright Office (“Board”) has considered Graceland Fruit, Inc.’s (“Graceland”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Fruit Bunch” (“Work”). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration.

I. DESCRIPTION OF THE WORK

The Work is a two-dimensional, multi-colored graphic design. The design consists of six equally sized colored circles in staggered pairs, one red, one magenta, and one purple. Centered above the middle pair of circles are two mirrored diamond-like shapes, each a different shade of green with two pointed and two rounded edges. The Work resembles a bunch of berries with leaves. The Work is as follows:



II. ADMINISTRATIVE RECORD

On November 19, 2020, Graceland filed an application to register a copyright claim in the Work. In a December 8, 2020, letter, a Copyright Office registration specialist refused to

register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to James Mitchell at 1 (Dec. 8, 2020).

In a letter dated December 17, 2020, Graceland requested that the Office reconsider its initial refusal to register the Work. Letter from James Mitchell to U.S. Copyright Office (Dec. 17, 2020) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Work “does not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration.” Refusal of First Request for Reconsideration from U.S. Copyright Office to James Mitchell (May 4, 2021) (“Refusal of First Request”).

In a letter dated June 14, 2021, Graceland requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. Letter from James Mitchell to U.S. Copyright Office (June 14, 2021) (“Second Request”). In that letter, Graceland argued that originality can be gleaned from the coordination of the colored shapes, specifically, the placement of “different colored disks” and the arrangement of “diamond shapes pointing inwardly towards the same central disk and point [sic] outwardly away from each other and away from the arrangement of disks.” *Id.* at 2.

III. DISCUSSION

After carefully examining the Work and applying the relevant legal standards, the Board finds that the Work does not contain the requisite authorship necessary to sustain a claim to copyright.

A work may be registered if it qualifies as an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). In this context, the term “original” consists of two components: independent creation and sufficient creativity. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. *Id.* Second, the work must possess sufficient creativity. *Id.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works—such as the alphabetized telephone directory at issue in *Feist*—fail to meet even this low threshold. *Id.* The Court observed that “[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity.” *Id.* at 363. It further found that there can be no copyright in a work in which “the creative spark is utterly lacking or so trivial as to be virtually nonexistent.” *Id.* at 359.

The Office’s regulations implement the longstanding requirement of originality set forth in the Copyright Act. *See, e.g.*, 37 C.F.R. § 202.1(a) (prohibiting registration of “[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering or coloring”); *id.* § 202.10(a) (stating “to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form”). Some combinations of common or standard design elements may contain sufficient creativity with respect to how they are juxtaposed or arranged to support a copyright claim. Nevertheless, not every combination or arrangement will be

sufficient to meet this test. *See Feist*, 499 U.S. at 358 (finding the Copyright Act “implies that some ‘ways’ [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not”). A determination of copyrightability in the combination of standard design elements depends on whether the selection, coordination, or arrangement is done in such a way as to result in copyrightable authorship. *Id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878, 883 (D.C. Cir. 1989); *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498–99 (S.D.N.Y. 2005).

Similarly, while the Office may register a work that consists merely of geometric shapes, for such a work to be registrable, the “author’s use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2021) (“COMPENDIUM (THIRD)”); *see also Atari*, 888 F.2d at 883 (“[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court.”). Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but would not register a picture consisting merely of a purple background and evenly spaced white circles. COMPENDIUM (THIRD) § 906.1; *see also Coach*, 386 F. Supp. 2d at 496 (refusing to register simple designs consisting of two linked letter “C” shapes “facing each other in a mirrored relationship” and two unlinked letter “C” shapes “in a mirrored relationship and positioned perpendicular to the linked elements”).

The individual elements of the Work—circles and diamond-like shapes—are unprotectable geometric shapes. *See* COMPENDIUM (THIRD) § 906.1 (stating that the Office generally “will not register a work that merely consists of common geometric shapes,” including “circles, ovals, . . . diamonds, [and] trapezoids”). Likewise, the combination of these unprotectable elements is insufficiently creative to support a copyright claim. Combinations of unprotectable elements can be protected when the “elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). Here, the selection and arrangement of the geometric shapes are not sufficiently creative to be protected by copyright. The Work consists of three staggered pairs of circles with mirrored diamond-like shapes aligned in the center above the circles. Mirroring and centering the diamond-like shapes above three pairs of staggered circles is too standard and “commonplace” to be copyrightable. *See Feist*, 499 U.S. at 363. The circles and diamond-like shapes are arranged in a vertically symmetrical way, which does not typically denote sufficient creativity. *See* COMPENDIUM (THIRD) § 312.2 (noting that “arranging geometric shapes in a standard or symmetrical manner” is an example of a compilation of elements that may not warrant copyright protection).

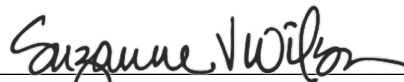
Graceland contends that “it took originality to arrange the colored shapes in the order they are arranged in” and “to place different colored disks in different locations in the arrangement.” Second Request at 2. Merely combining “expected or familiar pairs or sets of colors is not copyrightable.” COMPENDIUM (THIRD) § 906.3. Here, the coloring of the circles (shades of red and purple) and diamond-like shapes (shades of green) are common and

predictable colors of berries and leaves.¹ Moreover, the colors are arranged in a simple gradient effect from lightest to darkest, which is commonly found within logo designs.² As a result, neither the individual elements nor the selection and arrangement of the elements in the Work is sufficiently creative to warrant copyright protection.

Lastly, Graceland challenges the second refusal on the grounds that the Copyright Office improperly applied the patent law standard of obviousness. Second Request at 1. The Office did not apply the patent law standard; rather it properly used the phrase “age-old, obvious configuration” when explaining why the arrangement of uncopyrightable elements in the Work does not rise to the level of “a distinctive manner indicating some ingenuity.” Refusal of First Request at 3; *see also Atari*, 888 F.2d at 883.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claim in the Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.



U.S. Copyright Office Review Board

Suzanne V. Wilson, General Counsel and Associate
Register of Copyrights
Maria Strong, Associate Register of Copyrights and
Director of Policy and International Affairs
Jordana Rubel, Assistant General Counsel

¹ *See, e.g., Wine Grapes*, WIKIPEDIA.COM, <https://en.wikipedia.org/wiki/Grape#/media/File:Grapes.jpg> (last visited Aug. 4, 2022); *Grapes in the La Union Philippines*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Grape#/media/File:Grapes_in_the_Philippines_1.jpg (last visited Aug. 4, 2022); *Prunus cerasus, sour cherry (a true cherry species)*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Cherry#/media/File:Black_Che.jpg (last visited Aug. 4, 2022); *A coastal Washington cranberry bog*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Cherry#/media/File:Black_Che.jpg (last visited Aug. 4, 2022); *Blueberries*, WIKIPEDIA.COM, <https://en.wikipedia.org/wiki/Blueberry#/media/File:Blueberries.jpg> (last visited Aug. 4, 2022); *Leaf of Tilia tomentosa (Silver lime tree)*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Leaf#/media/File:Lisc_lipy.jpg (last visited Aug. 4, 2022).

² *See* VMA Staff, *Get in on the Gradient Design Trend*, VISUAL MEDIA ALL.: BLOG (July 1, 2020), <https://main.vma.bz/digest/get-in-on-the-gradient-design-trend> (discussing the increased use of gradients); Jacob Cass, *Logo Design Trends for 2020*, JUST CREATIVE (Dec. 16, 2019), <https://justcreative.com/2019/12/11/logo-design-trends-2020/> (listing color gradients as a top logo design trend and providing examples of logos currently using gradient); *WHY HAVE GRADIENTS BECOME THE NEW DESIGN TREND*, LOGOLADZ (2018), <https://www.logoladz.com/why-have-gradients-become-the-new-design-trend/> (discussing the benefits of using gradient in logos).